CONFIDENTIAL SETTLEMENT MEMORANDUM

PROTECTED BY ER 408

To: **DOJ Negotiating Team**

From: **Seattle Negotiating Team**

Dated: **May 16, 2012**

I. Introduction.

Thank you for your letter of March 30, 2012, and accompanying proposal for resolution of your investigation of the Seattle Police Department. We appreciate your ongoing attention to the challenges of ensuring that our local police are effective, fair and trusted by the community. These issues are of vital concern to our City and its residents.

The City has reviewed your proposal carefully, while also working to accommodate your desire for a speedy resolution of this matter. The City is pleased to be able to present to you today our proposal. Our proposal focuses on improving SPD use-of-force policies, procedures, practices and training. We would also like to provide some context for our decision to offer the DOJ a proposal limited to use-of-force issues.

II. Discussion of DOJ's Reform Proposal.

DOJ has presented the City with a comprehensive proposal to reform the Seattle Police Department under federal supervision. DOJ's proposal would establish a court-appointed monitor (or team of monitors) who, along with DOJ, would have ongoing authority to approve and oversee implementation of a wide array of department practices and policies beyond use of force. The proposal would specifically require creation of many new positions and hiring of additional personnel to support the monitors' work.

The City has a number of concerns regarding the scope of DOJ's proposal as well as the practical and logistical aspects of implementing such a proposal.

A. Financial Costs.

The City is concerned that the costs of implementing DOJ's proposal are prohibitive. Our preliminary analysis indicates the cost of full implementation of the proposal would be roughly $41 million for the first year alone. This includes: approximately $11 million to create new positions specifically required by the proposal; $18 million for development and implementation of required training programs; and $12 million for various programmatic

changes including changes to the OPA, EIS and IT systems, FIT team deployments, and implementation of mentoring programs, as well as the cost of the court monitor and staff.[1]

While these figures reflect many of the measures we see in the proposal as written, many additional costs are unknown. We cannot know what additional steps and staffing may be required to satisfy the monitor, the DOJ, and the court in the future. Some departments operating under federal supervision have described an "endless loop" where monitors and paid consultants continually identify new areas of concern for departments to address under their oversight.

We also note that the foregoing figures do not include costs of adopting and implementing new measures in accordance with Washington's collective bargaining laws. Many of the specific measures you identify would be subject to mandatory bargaining. Additional measures directed by an arbitrator going forward could likewise require bargaining. Implementation of such measures requires agreement with labor, or mandatory arbitration if no agreement is reached. Historically, implementation of such measures has resulted in significant additional labor costs for the City.

Costs of the magnitude described above are untenable in our current budget environment. The City has faced shortfalls in its General Fund budget in each of the past 4 years: $40 million in 2009; $32 million in 2010; $67 million in 2011; and $18 million in 2012. An additional $32 million shortfall is projected in both 2013 and 2014.

These shortfalls have necessitated painful choices. To balance the budget over this time period, the City has, for example:

- Eliminated 26 existing police officer positions, and put on hold the plan to add 63 additional police officers to fulfill the commitments of the City's 2007 Neighborhood Policing Plan;
- Closed City libraries for one week each year and reduced the library collections budget $1.3 million, or nearly 21%;
- Reduced community center operating hours by an average of 143 hours per community center, or 12%;
- Closed or reduced hours at wading pools across the City;
- Withheld inflation adjustments for non-profit human services providers since 2010.

Ongoing budget challenges threaten core functions of the police department. At this point:

---

[1] Our cost projections are consistent with the experiences of other departments. Los Angeles reports that it spent approximately $40 million in the first year to comply the terms of a federal consent decree, and close to $50 million annually for several years thereafter. New Jersey State Patrol reports that it was required to dedicate 300 full-time officers to meet the terms of a consent decree, and estimated that the total costs of compliance ran to $200 million.

- Patrol staffing is at minimum tipping point to maintain response time benchmarks. (At 520 patrol officers, SPD is averaging just less than 7 minutes average emergency response time, which is the minimum standard);
- Special operations units have been depleted to support Patrol Operations;
- Detective units are struggling after four years of reductions, and confronting decreased capacity to investigate and aid in the prosecution of criminals;
- Civilian support is at critical staffing levels in several key functions, as a result of abrogation of approximately 95 civilian positions over the past 9 years.

In this environment, every additional dollar that is spent to support federal oversight reduces funding for essential local services.

B. Feasibility.

The City is also concerned that some aspects of DOJ's proposal would be impossible or extremely impractical to satisfy, even if full funding were available. For example, your proposal demands that "[w]ithin 180 days of the Effective Date [of an agreement], first-line supervisors shall be assigned to supervise no more than on average six officers ("span of control")." ¶ 93. Satisfying this requirement would necessitate formal creation of approximately 54 new sergeant positions within SPD; the proposal specifically prohibits use of "acting" sergeants for this purpose. ¶ 94.

In order to hire new sergeants under City personnel rules, a Sergeant Examination must be announced and bibliography published one year in advance of the administration of a promotional exam. The testing process and certification of a civil service list typically takes 3-5 months to complete. Promotions from the civil service list are made through a selection process overseen by the Chief of Police, pursuant to the City Charter.

An attempt to conduct this process within 180 days would require suspension of City Civil Service rules, which would likely result in appeals and challenges under the City Code. It would also substantially compromise Department standards for promotion. In recent years the Department has seen approximately 50 candidates sit for biannual sergeant exams, and has promoted about 5-6 candidates a year. Implementation of DOJ's proposal would create a core of sergeants who are much less qualified by experience or training for their positions. Elevation of a large group of officers to sergeant would also deplete the officer ranks, potentially causing significant reduction in police services, 911 response times, and investigative response. The process of hiring new officers to fill these positions involves a similar cycle of qualification and testing, which typically takes about 12 months; an attempt to hire a large cadre of new officers in a very short period of time would raise similar concerns regarding qualification and training. In short, any realistic plan to substantially modify sergeant/ officer ratios would take far longer than 180 days, assuming funds were available.

The problems in meeting the DOJ's proposed promotion time-line is just an example of the impracticability of many of the requirements in the DOJ's proposal.[2] We are concerned that the DOJ does not fully recognize the implications of the various changes it recommends, and the steps needed to accomplish them.

C. Untested Standards.

The DOJ's proposal to create a 1:6 "span of control" ratio is not only impossible to accomplish within the given time frame, it does not reflect a standard that is widely accepted or typically found in major city police departments across the country. Other components of DOJ's proposal are similarly untested or inconsistent with generally-accepted policing standards, case law, and statutes. Examples include:

- A definition of "lethal force" to include a "neck hold," and any "strike to the head, neck or throat with a hard object including a fist";
- A new requirement that use of force should be "proportionate" to the amount and type of resistance offered (which is inconsistent with police training -- and, when combined with the proposed definition of lethal force, appears to indicate that officers could use deadly force on any individual who punches an officer or third party in the face, neck, or head);
- standards for use of OC spray that conflict with established training and manufacturer recommendations;
- a proposal to pair all officers with less than five year of experience with more senior officers (which would reduce available patrol units and increase response times);
- a mandate that CIT officers shall have supervisory responsibilities at the scene (which is inconsistent with the role of CIT officers, as well as the line of command).

We cannot agree to requirements that are untested or unworkable.[3] Our proposal offers effective changes that we believe reflect best practices, and can actually be put into practice.

---

[2] As another example: We have projected that DOJ's proposal calls for an estimated minimum 300% increase in training programs in SPD -- adding 120 hours to the existing, contractually mandated, 40 hours of annual in-service training. Implementation of this proposal would substantially reduce the patrol strength of the department. In order to avoid a reduction in police services, the department would be required to either backfill with existing employees and overtime (which creates significant administrative challenges, and may not be fully achievable) or hire and train new officers (which takes time, as described above). There are many other examples that we will be happy to review with you.

[3] The department has committed to ensure, through its Professional Standards Section, that new standards and policies will be based upon five foundational principles of: (1) best practices of the policing profession; (2) legal and constitutional standards; (3) research and evidence-based practices; (4) department and community values; and (5) internal and external collaboration.

D. Effectiveness and Operational Flexibility.

The City is also concerned that the requirements proposed in DOJ's decree undermine police responsiveness and effectiveness. The monitor's power to determine acceptable policies, and approve any changes to those policies, could limit the City's ability to direct the police and to adjust tactics in response to critical public safety needs.

During the recent May Day protests, for example, the City entered an emergency order authorizing police to seize weapons from individuals in the downtown core. Officers engaged countless individuals over the next several hours and seized over 90 weapons in attempt to restore order. It would not have been possible to conduct this operation within the specific requirements mandated by DOJ's proposal -- officers would simply not have had time to provide immediate, detailed reporting and review for each investigative stop, and each minor use of force, as required by DOJ. But any change or modification of the policy would have required monitor approval. Similar problems could arise in the City's efforts to respond to the recent increase in gun violence, or other localized public safety problems. Indeed, a central problem with the DOJ's proposal is that the City does not know what specific policies and procedures may be directed by the monitor in future, or how those policies will limit the City's ability to respond to emerging public safety issues. The City's proposal addresses those issues by requiring agreement on the policies and procedures in advance of signing the agreement, and clearly defining the role of the monitor.

E. Local Accountability.

The City is concerned that adoption of DOJ's proposal would undermine local decision-making and accountability. Policing and public safety are core responsibilities of state and local governments, who are directly accountable to the citizens they serve. Management of local police involves many competing demands and trade-offs, and requires consideration of:

- How much is the public willing to pay for policing services?
- What level of enforcement is appropriate for different public safety problems, and in different geographic areas?
- Within constitutional limitations, what police measures and tactics are acceptable to the local community?

Ceding broad powers over local police policy to an unelected monitor and federal officials is problematic, insofar as there is no mechanism to ensure that problems are addressed in a manner that appropriately balances competing local concerns.

III. DOJ's Pattern or Practice Findings.

The City's proposal offers improvements in SPD's reporting, investigation and response to officer use of force. We make this proposal even though we question whether an adequate basis exists for finding that SPD has engaged in a pattern or practice of unconstitutional policing through the use of unnecessary or excessive force. DOJ's findings are based upon a review of SPD's internal use-of-force reports by two consultants retained by DOJ. DOJ's Findings Letter indicated that the consultants did not review all of the reports provided, but instead examined a

"randomized, stratified, and statistically valid sample" of the reports. DOJ has declined to respond to the City's requests to identify how many reports the consultants reviewed, which reports they reviewed, and which uses of force they identified as excessive. While the City does not know which use-of-force reports formed the basis for the DOJ's findings, we are concerned that DOJ has not given due weight to the inherent limitations of this evidence. Available data indicate that use-of-force rates are relatively low in Seattle.

- The number of use of force incidents by Seattle police decreased by 35% from 2006 to 2010.
- Only 0.12% of interactions between SPD officers and the public resulted in a use of force in 2010. The national use of force rate for all interactions with police officers is estimated at between 0.5% and 1%.
- Only 2.5% of all arrests in 2010 involved any use of force, down from 3.3% in 2006. This compares favorably with comparable cities for which data is available: Portland's use of force rate relative to arrests was 4.2%, and San Jose's was 3.2%.
- Only 0.38% of arrests in 2010 resulted in a complaint about officers' use of force. This rate is nearly one-third lower than the average for metropolitan police departments as reported by the Bureau of Justice Statistics.

The fact that DOJ has limited its analysis to a small subset of cases where force was used should prompt caution in drawing broad conclusions from the evidence. For example, DOJ's conclusion that SPD officers "*too quickly resort to the use of impact weapons, such as batons and flashlights*" should be considered in light of evidence that batons are used in just 1.5% of all reported uses of force (a total of 39 cases in 2009 and 2010), and that flashlights – which are typically small plastic stinger flash lights, with little capacity to inflict any injury -- are used even less (1% of all reported uses of force). DOJ's finding that officers "*escalate situations and use unnecessary or excessive force when arresting individuals for minor offenses*" is likewise problematic, insofar as DOJ's analysis was itself limited to the small subset of cases that escalated to the point where force was used.

SPD's overall low use-of-force rates, declining trends in uses of force, and a very low complaint rate all disfavor a pattern or practice case against the City under 42 U.S.C. § 14141.

A. Legal Bases for Liability Under 42 U.S.C. §14141.

While there been little judicial analysis of 42 U.S.C. §14141**,** the limited guidance that exists suggests that a §14141 case would be subject to the same standards set forth under 42 U.S.C. §1983 and *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691 (1978). *See United States v. City of Columbus*, 2000 WL 1133166 (S.D.Ohio 2000). In *Monell*, the Court held that "Congress did not intend municipalities to be held liable unless action pursuant to *official municipal policy of some nature* caused a constitutional tort." (emphasis added). Accordingly, municipal liability for an unconstitutional policy, practice, or custom cannot be predicated on isolated or sporadic incidents, rather "it must be founded upon practices of sufficient duration, frequency, and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

A "failure to train" employees may in some cases provide a basis for municipal liability, but only where "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of Constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

The only substantive findings that are offered in the DOJ's Findings Letter relate to use of force.[4] Even on use of force, however, DOJ's findings do not establish that alleged instances of excessive force are rooted in any municipal policy, or reflect a "deliberate indifference" to the rights of citizens. In fact, DOJ recognized that the City and SPD have undertaken sustained, significant measures to monitor and address complaints of improper force by police. DOJ's analysis tends to suggest that excessive force exists "in spite of" City policy, not because of it. This raises a significant question as to whether DOJ can sustain an action under § 14141 to address claims of excessive force, even assuming that its underlying factual findings are valid.

B. Review of Factual Findings Regarding Excessive Force.

As you know, a claim of unnecessary or excessive force incident to an arrest is evaluated under the Fourth Amendment's objective reasonableness test. *Graham v. Connor*, 490 U.S. 386, 394 (1989). The inquiry is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. The question is not simply whether the force was necessary to accomplish a legitimate police objective; it is whether the force used was reasonable in light of all the relevant circumstances. *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir.). Under this standard, force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham* at 396-97. In developing the test under *Graham*, the United States Supreme Court specifically recognized that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)). As such, an analysis of force "requires careful attention to the facts and circumstances of each particular case[.]" *Id.*

Because the test of reasonableness is so fact specific, it is important that all aspects of an encounter between the police and a citizen be taken into account in determining whether force was excessive. The City reviewed the use of force packets for all of the identifiable incidents in the DOJ's December 16, 2011 findings letter and found that many facts that tended to make the officer conduct objectively reasonable were not recited in DOJ's summaries.

For example, in the DOJ findings letter at page 10, there is a description of an incident where a group of officers took down and subdued a man whose "stressed mental state was apparent." DOJ's description omits the facts that the man was high on PCP and acting in a way

[4] The DOJ Findings Letter does not identify any department policies or customs that result in systematic constitutional violations relating to: social contacts; investigatory stops and detentions; bias-free policing; community engagement; community outreach, and problem solving; misconduct complaint intake, investigation, and adjudication; or transparency and public reporting. As such, there is no apparent basis for liability and imposition of a federal consent decree requiring corrective action in these areas.

that endangered himself and others. The man was running in traffic and a number of cars had to swerve to avoid him. Officers, including one who was a trained EMT, made multiple attempts to persuade the man to get out of the street. When the officers finally began using force to restrain him, OC Spray and initial strikes had no effect; it took four officers and a prolonged struggle to finally subdue him.

None of this detail appears in the DOJ report. DOJ's description of this matter selects and omits material facts in such a way as to suggest that police used "pedestrian interference" as a pretext to needlessly accost and beat a mentally distressed individual. When the actual facts and circumstances of the case are considered, however, the validity of DOJ's finding is far from certain. It is not fair to say that officers in this case were intervening simply to address a "minor offense," or that they failed to use tactics "designed to de-escalate the situation." When all the relevant facts are considered, as required by *Graham*, it is not at all clear that the force used was constitutionally excessive.

Similar problems are evident in each of the case illustrations offered in the DOJ Findings Letter. We would be happy to discuss each of these cases with you. In each case, DOJ has omitted facts that tend to explain the reasonableness of officers' actions, and, in so doing, created a very incomplete picture of how and why force was used. This sort of analysis is insufficient to establish a pattern and practice of excessive force under *Graham*.

IV. The City's Proposal.

Notwithstanding the legal and factual issues and concerns identified above, the City has developed a substantive proposal that directly addresses the concerns raised by DOJ in its findings on unnecessary and excessive uses of force. The City recognizes there are significant community concerns regarding the use of unnecessary or excessive force by Seattle Police Department officers. The City's proposal provides for concrete and measurable steps that will improve policies, training, and supervision related to uses of force. The City's proposal draws from key aspects of DOJ's proposal that are directly related to use-of-force issues and can be implemented in a cost effective manner. The reforms contained in the City's proposal will have the greatest positive impact on constitutional policing while ensuring that the department continues to provide effective law enforcement services.

The City is willing to explore entering into a court enforceable agreement on the fundamental elements of DOJ's proposal: namely independent monitoring and the reform of policies and procedures related to use of force reporting and investigation. Attached to this letter is the City's proposed settlement agreement which contains the specific terms suitable for a court enforceable and monitored agreement. We look forward to speaking with you about this proposal.